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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
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11 LILLIAN FINCH,) Case No. CV 06-2229-RC
12)
13 Plaintiff,)
14)
15 vs.) OPINION AND ORDER
16)
17 JO ANNE B. BARNHART,)
Commissioner of the Social)
Security Administration,)
Defendant.)
_____)

18 On April 12, 2006, plaintiff Lillian Finch filed a petition for
19 writ of mandamus,¹ a supporting memorandum of points and authorities,
20 and the supporting purported declaration of plaintiff's counsel,²
21 Manuel D. Serpa, with exhibits. On June 22, 2006, defendant filed a
22 _____

23 ¹ The plaintiff seeks an order compelling the Commissioner
24 to consider her request that the Appeals Council review the
25 Administrative Law Judge's decision denying her application for
disability benefits.

26 ² The purported declaration of Mr. Serpa does not comply
27 with the requirements of 28 U.S.C. § 1746 because it is not under
28 penalty of perjury. Therefore, Mr. Serpa's purported declaration
is merely hearsay evidence, rather than competent evidence, and
the Court cannot consider it for the truth of the statements
therein.

1 motion to dismiss the petition and the supporting declaration of
2 Dennis V. Ford, with exhibits, and on July 7, 2006, plaintiff filed a
3 reply.

4 5 **BACKGROUND**

6 On December 4, 2002, plaintiff filed an application for
7 disability benefits under Title II of the Social Security Act ("the
8 Act"), 42 U.S.C. § 423. On July 7, 2005, following an administrative
9 hearing, Administrative Law Judge Theodore T. Gotsch ("the ALJ")
10 issued a decision finding plaintiff is not disabled and denying
11 plaintiff's application for disability benefits. Declaration of
12 Dennis V. Ford ("Ford Decl."), ¶ 3(a), Exh. 1. The plaintiff
13 attempted to obtain review by the Appeals Council of the ALJ's
14 decision; however, on March 6, 2006, the Appeals Council dismissed
15 plaintiff's request for review, stating:

16
17 The request for review filed on November 4, 2005, was not
18 filed within 60 days from the date notice of the decision
19 was received as required by 20 CFR 404.968(a). The date of
20 receipt of such notice is presumed to be five (5) days after
21 the date of such notice unless a reasonable showing to the
22 contrary is made. [¶] The regulations provide that the
23 Appeals Council may dismiss a request for review where the
24 claimant has failed to file the request within the stated
25 period of time and the time for filing has not been
26 extended. The time period will be extended if good cause is
27 shown for missing the deadline. [¶] Your letter dated
28 February 17, 2006 cites portions of the Appeals Council's

1 regulatory policy on filing a request for review of a
2 hearing decision/order. As you rightly note, a request for
3 review must be filed within 60 days from the date you get
4 the notice of hearing decision and the Appeals Council
5 assumes that the notice was received within 5 days after the
6 date of the notice. That regulatory policy also provides
7 that a request for review will be considered filed as of the
8 date it is received in any SSA office or other authorized
9 place. It further provides that where the request for
10 review is mailed the U.S. Postal Stamp cancellation or
11 "postmark" date on the envelope in which the request is
12 mailed to us may be used as the date of filing. In the
13 instant case, a stamp from the Post Office on a "certificate
14 of mailing" does not constitute a postmark as it does not
15 represent the stamp cancellation on the envelope in which
16 the request for review was mailed to us. In fact, according
17 to the U.S. Postal Service[], the certificate of filing is
18 used to provide a record for the customer and since they do
19 not verify the articles intended for mailing or the actual
20 mailing, it does not constitute legal proof of mailing.
21 There being no other documentation of filing prior to the
22 facsimile dated November 4, 2005, or possibly October 5,
23 2005[,], no earlier date can be established in this case. [¶]
24 The Appeals Council, therefore, finds that there is no good
25 cause to extend the time for filing and, accordingly,
26 dismisses the claimant's request for review.

27
28 Ford Decl., ¶ 3(c), Exh. 4 (citations omitted).

DISCUSSION

I

A federal court may dismiss a complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). When, as here, subject matter jurisdiction is challenged in a motion to dismiss, plaintiff has the burden of proving jurisdiction. Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam); Ashoff v. City of Ukiah, 130 F.3d 409, 410 (9th Cir. 1997).

"A Rule 12(b)(1) jurisdictional attack may be facial or factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005); Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003), cert. denied, 541 U.S. 1009 (2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air for Everyone, 373 F.3d at 1039; Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). When the motion to dismiss constitutes a "factual attack" on federal jurisdiction, "the district court is not confined to the four corners of the complaint - it may consider facts and need not assume the truthfulness of the complaint[,]" and the existence of disputed material facts will not preclude the Court from evaluating the existence of subject matter jurisdiction. Americopters, LLC v. Federal Aviation Admin., 441 F.3d 726, 732 n.4 (9th Cir. 2006) (emphasis in original); Safe Air for Everyone, 373 F.3d at 1039.

1 "Federal courts are not courts of general jurisdiction; they have
2 only the power that is authorized by Article III of the Constitution
3 and the statutes enacted by Congress pursuant thereto." Bender v.
4 Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326,
5 1331, 89 L. Ed. 2d 501 (1986); Kokkonen v. Guardian Life Ins. Co. of
6 America, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391
7 (1994). Congress may prescribe the procedures and conditions under
8 which the federal courts may review administrative orders. City of
9 Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336, 78 S. Ct. 1209,
10 1218, 2 L. Ed. 2d 1345 (1958); Bacon v. Sullivan, 969 F.2d 1517, 1519
11 (3d Cir. 1992). Congress has enacted Section 405(g) of the Act, which
12 provides:

13
14 Any individual, after any final decision of the Commissioner
15 of Social Security made after a hearing to which he was a
16 party, . . . may obtain a review of such decision by a civil
17 action commenced within sixty days after the mailing to him
18 of notice of such decision or within such further time as
19 the Commissioner of Social Security may allow.

20
21 42 U.S.C. § 405(g). Under Section 405(g), this Court has no
22 jurisdiction to review the Appeals Council's dismissal of plaintiff's
23 request for review as untimely, since such a dismissal is not a "final
24 decision" within the meaning of Section 405(g). Matlock v. Sullivan,
25 908 F.2d 492, 494 (9th Cir. 1990); Dietsch v. Schweiker, 700 F.2d 865,
26 867 (2d Cir. 1983); see also O'Connell v. Chater, 958 F. Supp. 466,
27 468 (C.D. Cal. 1996) (Under Section 405(g), "[t]his Court has no
28 jurisdiction to determine whether the Appeals Council erred in finding

1 plaintiff's request for review to be untimely.").

2
3 Here, rather than relying on Section 405(g) for jurisdiction,
4 plaintiff contends the mandamus statute, 28 U.S.C. § 1361, provides
5 this Court with subject matter jurisdiction because plaintiff alleges
6 the Commissioner erred in dismissing plaintiff's timely request for
7 review. Petition at 1:20-27, 7:11-17. The plaintiff is correct.

8
9 District courts have jurisdiction over "any action in the nature
10 of mandamus to compel an officer or employee of the United States or
11 any agency thereof to perform a duty owed to the plaintiff." 28
12 U.S.C. § 1361. Section 1361 "is an appropriate basis for jurisdiction
13 in an action challenging procedures used in administering social
14 security benefits." Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir.
15 2003); Johnson v. Shalala, 2 F.3d 918, 924-25 (9th Cir. 1993); see
16 also Powderly v. Schweiker, 704 F.2d 1092, 1095 (9th Cir. 1983)
17 ("[M]andamus jurisdiction is proper to vindicate an interest in
18 procedural regularity."). However, "[m]andamus is an extraordinary
19 remedy and is available to compel a federal official to perform a duty
20 only if: (1) the individual's claim is clear and certain; (2) the
21 official's duty is nondiscretionary, ministerial, and so plainly
22 prescribed as to be free from doubt, and (3) no other adequate remedy
23 is available.'" Kildare, 325 F.3d at 1084 (citations omitted); Lowry
24 v. Barnhart, 329 F.3d 1019, 1021 (9th Cir. 2003).

25
26 Social Security regulations provide that a claimant who is
27 dissatisfied with an ALJ's decision "may request that the Appeals

28 //

1 Council review that action." 20 C.F.R. § 404.967.³ A request for
2 Appeals Council review must be filed "[w]ithin 60 days after the date
3 [the claimant] receive[s] notice of the hearing decision or dismissal.
4" 20 C.F.R. § 404.968(a). The claimant is presumed to have
5 received notice of the decision within five days after the date of the
6 notice unless the claimant demonstrates she did not receive the notice
7 within the five-day period. 20 C.F.R. § 404.901. "Thus, a claimant
8 in actuality has 65 days from the date of the ALJ's decision in which
9 to file a request for review." Dietsch, 700 F.2d at 867. The time
10 for filing a request for review may be extended, however, if the
11 claimant shows she has "good cause for missing the deadline." 20
12 C.F.R. §§ 404.911, 404.968(b).

13
14 In responding to a claimant's request for review, "[t]he Appeals
15 Council may deny or dismiss the request for review, or it may grant
16 the request and either issue a decision or remand the case to an
17 administrative law judge." 20 C.F.R. § 404.967. "The Appeals Council
18 will dismiss [a claimant's] request for review if [she] did not file
19 [her] request within the stated period of time and the time for filing
20

21 ³ Section 404.967 provides:

22 If you or any other party is dissatisfied with the
23 hearing decision or with the dismissal of a hearing
24 request, you may request that the Appeals Council
25 review that action. The Appeals Council may deny or
26 dismiss the request for review, or it may grant the
27 request and either issue a decision or remand the case
28 to an administrative law judge. The Appeals Council
shall notify the parties at their last known address of
the action it takes.

20 C.F.R. § 404.967.

has not been extended[,]” and it may also dismiss a proceeding if the claimant files a written request for dismissal or the claimant or any other party to the proceeding dies. 20 C.F.R. § 404.971. The Appeals Council's dismissal of a request for review “is binding and not subject to further review.” 20 C.F.R. § 404.972. Absent any of the reasons for dismissal set forth in Section 404.971, the Appeals Council may either “deny a party's request for review or it may decide to review a case and make a decision.” 20 C.F.R. § 404.981.⁴

Here, the Appeals Council dismissed plaintiff's request for review, determining it was not timely filed and there was no good cause to extend the time for filing. Ford Decl., ¶ 3(c), Exh. 4.⁵ The plaintiff, relying on 20 C.F.R. §§ 404.967 and 404.981, contends mandamus is appropriate because she “seeks to compel the Appeals Council to perform the duty it owes to [her] when a request for review is timely filed: the Council must look at the merits of the case in light of the ALJ's decision and must either deny the request or review her case.” Petition at 7:12-17. In other words, plaintiff contends the Appeals Council clearly erred in dismissing her request for review as untimely, and in so doing failed to perform its nondiscretionary

⁴ “[I]f the Appeals Council grants review of a claim, then the decision that the Council issues is the Commissioner's final decision. But if . . . the Council denies the request for review, the ALJ's opinion becomes the final decision.” Sims v. Apfel, 530 U.S. 103, 106-07, 120 S. Ct. 2080, 2083, 147 L. Ed. 2d 80 (2000).

⁵ This Court does not have mandamus jurisdiction to review whether good cause existed to extend the time for plaintiff to file a request for review since that decision is discretionary, Burbage v. Schweiker, 559 F. Supp. 1371, 1375 (N.D. Cal. 1983), and plaintiff does not contend otherwise.

1 duty to either grant or deny her request for review.

2
3 Some agency regulations create judicially enforceable duties, and
4 others do not. Lowry, 329 F.3d at 1022. As the Ninth Circuit has
5 held:

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7 To be judicially enforceable, a pronouncement must
8 "prescribe substantive rules - not interpretive rules,
9 general statements of policy or rules of agency
10 organization, procedure or practice," and must have been
11 "promulgated pursuant to a specific statutory grant of
12 authority and in conformance with the procedural
13 requirements imposed by Congress."

14
15 Id. (citations omitted; emphasis in original). Regarding the
16 regulations upon which plaintiff relies, 20 C.F.R. §§ 404.967 and
17 404.981, the Second Circuit has found mandamus jurisdiction exists to
18 address a claimant's contention that the Appeals Council erroneously
19 dismissed a timely filed request for review, stating:

20
21 Plaintiff's challenge is a procedural one: he seeks to
22 compel the Appeals Council to perform its duty with respect
23 to a timely request for review, 20 C.F.R. §§ 404.967,
24 404.981, and either deny the request or review his case. He
25 has no other avenue for relief. And his procedural dispute
26 is unrelated to the merits of his claim for benefits. We
27 conclude that the district court had mandamus jurisdiction
28 under 28 U.S.C. § 1361 to consider his claim.

1 Dietsch, 700 F.2d at 868; see also Sullivan v. Heckler, 602 F. Supp.
2 85, 87 n.5 (D. Md. 1985) (district court has mandamus jurisdiction to
3 address claimant's challenge to Appeals Council's dismissal of
4 allegedly timely request for review). This Court agrees.

5
6 The Commissioner owes plaintiff a nondiscretionary duty to
7 adjudicate her claim for disability benefits in accordance with the
8 requirements of the Act and its regulations. Johnson, 2 F.3d at 924;
9 see also Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) ("The Code
10 of Federal Regulations is clearly binding upon the Commissioner.
11 . . ."). Absent circumstances not present here, such as a claimant's
12 death or the voluntary withdrawal of a request for review, Social
13 Security regulations require the Appeals Council to either deny or
14 review a timely filed request for review. Dietsch, 700 F.2d at 868.
15 Moreover, plaintiff has no other avenue for relief in addressing her
16 procedural claim that she timely mailed her request for review to the
17 Appeals Council; therefore, mandamus jurisdiction is appropriate. Id.

18 19 II

20 Now that this Court has determined it has jurisdiction to address
21 the merits of plaintiff's mandamus petition, it must consider the
22 evidence plaintiff relies upon to support her claim that she timely
23 filed a request for review with the Appeals Council. First, plaintiff
24 has not presented any competent evidence showing the date she actually
25 received the ALJ's decision; thus, the regulation establishing the
26 presumption that a claimant receives notice within five days of the
27 ALJ's decision applies. Since the ALJ's decision was issued on
28 July 7, 2005, it is presumed plaintiff received it by July 12, 2005,

1 and she then had sixty days, or until September 12, 2005,⁶ to mail (or
2 file) her request for review to the Appeals Council. 20 C.F.R. §§
3 404.901, 404.968(a); see also Dietsch, 700 F.2d at 868-69
4 ("[P]laintiff's request for review was timely if it was mailed within
5 the time period provided by the regulation."); Monferrato v.
6 Schweiker, 700 F.2d 869, 870 (2d Cir. 1983) ("[M]ailing [a request for
7 review] constitutes filing under the regulations.").

8
9 Second, the evidence plaintiff presented to the Appeals Council
10 to show she timely mailed her request for review to the Appeals
11 Council was not competent evidence. Rather, the evidence consisted of
12 copies of a letter dated August 3, 2005, stating three requests for
13 review were being submitted, including one for plaintiff, with a
14 United States Post Office certificate of mailing addressed to the
15 Appeals Council, and containing a partially legible date. Ford Decl.,
16 ¶ 3(b), Exhs. 2-3. The Appeals Council found this evidence
17 insufficient for the reasons set forth above, and this Court agrees.

18
19 ⁶ Since 60 days from July 12, 2005, fell on a Saturday,
20 September 10, 2005, plaintiff had until Monday, September 12,
21 2005, to timely mail (or file) her request for review to the
22 Appeals Council. See 20 C.F.R. § 404.3 ("[W]here any provision
23 of [T]itle II, . . . or any regulation of the Commissioner issued
24 under [T]itle II, provides for a period within which an act is
25 required to be done which affects eligibility for or the amount
26 of any benefit or payment under this title or is necessary to
27 establish or protect any rights under this title, and such period
28 ends on a Saturday, Sunday or Federal legal holiday or on any
other day all or part of which is declared to be a nonwork day
for Federal employees by statute or Executive Order, then such
act shall be considered as done within such period if it is done
on the first day thereafter which is not a Saturday, Sunday, or
legal holiday or any other day all or part of which is declared
to be a nonwork day for Federal employees either by statute or
Executive Order.").

1 Without competent evidence such as a declaration showing proof of
2 service, for example, the certificate of mailing, by itself, is simply
3 insufficient to demonstrate plaintiff timely mailed (or filed) her
4 request for review to the Appeals Council.⁷ Thus, plaintiff's
5 petition for writ of mandamus must be denied on the merits.

6
7 **ORDER**

8 IT IS ORDERED that: (1) defendant's motion to dismiss the
9 petition for mandamus under Fed. R. Civ. P. 12(b)(1) for lack of
10 subject matter jurisdiction is denied; and (2) plaintiff's petition
11 for writ of mandamus is denied and the action is dismissed, and
12 Judgment shall be entered accordingly.

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14 DATE: September 14, 2006

/s/ Rosalyn M. Chapman
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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25 ⁷ Since Mr. Serpa's purported declaration also is not
26 competent evidence, no competent evidence has been presented to
27 this Court either establishing that plaintiff timely mailed (or
28 filed) her request for review of the ALJ's decision to the
Appeals Council.